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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION
OF OPERATING ENGINEERS, LOCAL 406, *et al*,
Petitioners,

v.

ROBERT GUIDRY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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February 27, 1990

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QUESTION PRESENTED

1. Should the judgment below be disturbed because of an alleged inconsistency between a part of the opinion below and *Breininger v. Sheet Metal Workers*, 110 S. Ct. 424 (1990), where the court of appeals affirmed the trial court on three separate grounds, only one of which is undermined by *Breininger*?

2. Did the court of appeals correctly hold that damages may be awarded for emotional distress when a union has deprived members of work and threatened them and their families with physical injury in retaliation for their exercise of their right of free speech within the union?

3. Did the court of appeals correctly hold that a district court has discretion to award modest punitive damages when a union acted with "actual malice" in retaliating against political dissidents?

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MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Respondent Robert Guidry and eleven other members of petitioner International Union of Operating Engineers Local 406 ("Local 406") sued Local 406 and four of its officers — petitioners Peter Babin III, Willard Carlock, Sr., Columbus Laird, and Don Schiro (the "local officers") — alleging violations of the duty of fair representation and the Union Members' Bill of Rights, which is Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411 *et seq.* ("LMRDA"). The plaintiffs alleged that some of them

had opposed the incumbent officers in intra-union elections and other political disputes within the union, that some of them had simply refused to contribute to the intra-union political campaigns of the incumbents, and that some of them had cooperated with criminal investigations into the officers' conduct.[1] In retaliation for this conduct, plaintiffs and their families were subjected to numerous threats of physical harm, including threats against their lives, and were blacklisted at the union hiring hall. In addition, respondent Guidry was expelled from the union, to which he had belonged since 1949, for having crossed a picket line established at a non-union contractor that employed him during the period when he was frozen out of the union hiring hall.

After a bench trial lasting several weeks, the district court entered detailed findings upholding plaintiffs' claims of physical and economic retaliation. Appendix to the Petition ("Pet. App.") at A44-A59. The court concluded that this retaliation violated the duty of fair representation ("DFR"), Pet. App. A60-A61, plaintiffs' right of free speech under section 101(a)(2) of the LMRDA, Pet. App. A62, and plaintiffs' right not to be disciplined without due process under section 101(a)(5) of the LMRDA or for an improper purpose under 609 of the LMRDA. Pet. App. A62-A63. The court also held that, because the membership meeting at which respondent Guidry was expelled had been packed with supporters of petitioner Carlock, after petitioner Laird had telephoned them to ensure that they would attend to

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[1] Petitioners Carlock and Laird, among others, were convicted of various offenses, including racketeering, extortion, illegal payments from employers, and obstruction of justice. Appendix to the Petition for Writ of Certiorari at A39-A40.

vote against respondent Guidry, his expulsion violated the "fair hearing" requirement of section 101(a)(5). Pet App. A69.

Because the district judge believed that the statute of limitations for DFR and LMRDA violations alike was six months, he based his damages awards on that time period. *Id.* A63. He awarded all of the plaintiffs together almost $25,000 in back wages, including $5,310.50 for respondent Guidry, *id.* A63-A67; $58,000 in damages for mental and emotional distress caused by both the loss of livelihood and the threats of physical harm, including $20,000 for respondent Guidry, *id.* A67-A69; and punitive damages of $132,000, including $11,000 for respondent Guidry. *Id.* A70-A73. Finally, the district court ordered petitioner Local 406 to pay plaintiffs their reasonable attorney's fees, both because they had acted toward plaintiffs with bad faith, and because plaintiffs' victory had conferred a common benefit on the membership as a whole that should be taxed against the union treasury. *Id.* A73-A74.

Petitioners appealed only the judgment in favor of respondent Guidry, and Guidry cross-appealed. *Id.* A7. The court of appeals affirmed the district court's holdings with respect to liability, and specifically upheld the district court with respect to each of Guidry's theories: the duty of fair representation, *id.* A15 n.5, free speech under section 101(a)(2), *id.* A19 n.6, A21, A25, and discipline without due process under section 101(a)(5) and for an improper purpose under section 609. *Id.* A16-A23. But the court held that, in light of this Court's intervening decision in *Reed v. UTU*, 109 S. Ct. 621 (1989), and in light of the fact that this case, like *Reed*, involved a claim under section 101(a)(2) of the LMRDA,

the statute of limitations was properly one year, not six months. Pet. App. A25-A26. Accordingly, the court held that the district court should recompute both punitive and actual damages in light of the new limitations period and other considerations discussed in its opinion. *Id.* A26-A30. However, the court reversed the award of attorney fees on the grounds that fees may be awarded for bad faith only when the bad faith is exhibited during the litigation, not where the bad faith is part of the underlying action, and that attorney fees are never available in LMRDA cases on the common benefit theory when the plaintiff receives an award of damages. *Id.* A30-A32.[2]

After the court of appeals denied petitioners' request for rehearing and rehearing *en banc* without any judge having requested a poll, petitioners filed their Petition.

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[2] Although we disagree with this ruling, respondent is not filing a cross-petition because he believes that the remand permits attorney fees to be included as part of the measure of punitive damages. Such relief is particularly necessary here because an award of $36,310.50 in damages would not, through a contingent fee arrangement, produce payment of reasonable attorney fees for cases such as this one involving a trial lasting several weeks. In the event that fees are not incorporated in the punitive damages portion of the remand judgment, there will be time enough to raise that issue in the court of appeals and in this Court, if necessary.

REASONS FOR DENYING THE WRIT

A. The Findings of Liability Upheld by the Court of Appeals Do Not, with One Exception, Raise Any Conflict with Any of This Court's Decisions, and Reversing on That Ground Would Not Affect the Relief Awarded.

In *Breininger v. Sheet Metal Workers Local 6*, 110 S. Ct. 424 (1989), this Court held that, when union leaders retaliate against members for having exercised intra-union political rights, by denying them referrals from the union hiring hall, the members have a claim for violation of the duty of fair representation. The court also held, however, that at least where the retaliation is effectuated by the union leadership for their own interests, without invoking the formal decision-making procedures of the union or imposing any stigma for having allegedly violated legitimate union rules, there is no "discipline." Accordingly, in those circumstances there can be no claim under section 101(a)(5) of the LMRDA, which requires a union to afford members due process before imposing discipline, or under section 609 of the LMRDA, which forbids discipline for having exercised rights under the LMRDA. *Id.* at 438-440. The Court expressly reserved the question of whether such retaliation would "infringe" the members' free speech rights under sections 101(a)(2) and 102 of the LMRDA, because the union member had neither alleged a violation of section 101(a)(2) in his complaint nor presented the question as to either section in his petition. *Id.* at 440 n.18.

The court of appeals appears to have upheld the district court's findings of liability on one ground that may be inconsistent with *Breininger* — the claim that the hiring hall retaliation was discipline — although it may be that the use of formal disciplinary proceedings here is enough to bring the hiring hall discrimination within section 101(a)(5). If that were the sole basis of the ruling below, there might be some reason to remand for reconsideration in light of *Breininger*. However, the court of appeals also found violations of both the duty of fair representation, a theory that was squarely upheld in *Breininger*, and of section 101(a)(2), a theory that is in no way inconsistent with *Breininger*. Thus, *Breininger* is no reason to upset or even reconsider the decision below. Because petitioners do not suggest that the decision below concerning liability on these grounds is inconsistent with any other decisions of this Court or of other courts of appeals, the first question presented does not support review in this Court.

We note that, in footnote 5 of the petition, at 7, petitioners seem to quibble over the court of appeals' discussion of section 102 of the LMRDA contained in footnote 6 of its opinion, Pet. App. A19, which they describe as "dicta." We do not understand why an alternate ground for affirmance would be considered dicta, but in any event, in addition to the footnote, the court of appeals clearly upheld the finding of liability in reliance on section 101(a)(2), in a way that does not depend on a finding of discipline. For example, in its discussion of the statute of limitations, the court of appeals drew on *Reed v. UTU*, *supra*, which fixed the limitations period for section 101(a)(2) cases, Pet. App. A25, and noted that applying a one-year limitations

period was appropriate in this case because such a period "would further the remedial goals of section 101(a)(2) of the LMRDA." Pet. App. A26 n.7. The court also discussed with approval a Sixth Circuit decision holding that, although the hiring hall retaliation in that case was not "discipline," it was nevertheless actionable as a violation of section 101(a)(2). *Id.* A21. And in discussing the rights that Guidry had exercised, the court made it clear that it considered the issue to be whether there had been a violation of section 101(a)(2). *Id.* A12. Thus, whether or not the court of appeals or respondent expressly invoked the jurisdictional provision in section 102, both the court and the respondent clearly relied on the cause of action created by section 101(a)(2).

Finally, unlike *Breininger*, where the issues of section 101(a)(2) rights and section 102 infringement were not addressed because the union member had lost below and had not presented the issue in his petition, here the member has won below, and these legal rights would provide an alternate ground for affirmance even if they had not been raised below. Here it is the union and its officers who have failed to present the section 101(a)(2) issue in their petition, and it is they who would be unable to secure a change in the judgment even if they were to prevail on their claims about sections 101(a)(5) and 609. Indeed, both the finding of liability and the award of damages for emotional distress could be affirmed even without a finding of liability based on the LMRDA, because the DFR was also breached in a manner found actionable by this Court in *Breininger*. Thus, even if the Court wished for some reason to have the section 101(a)(5) issue discussed again in the court

of appeals, there is no reason whatsoever to disturb the judgment of the court of appeals on the issue of liability.

B. The Damages Issues Raised by the Petition Involve Neither Important Questions of Law Nor a Significant Conflict Among the Lower Courts.

1. In *IBEW v. Foust*, 442 U.S. 42 (1979), the Court held that punitive damages may not be awarded against unions for breach of the DFR, while expressly reserving the issue of whether such damages may be awarded under the LMRDA. *Id.* at 47 n.9. Justice Blackmun's concurring opinion approved of this reservation, while expressing the *fear* that the opinion might imply that punitive damages were unavailable in LMRDA cases. No Justice advocated a prohibition on punitive damages in such cases, and the circuits, both before and since *Foust*, are unanimous in approving punitive damages in LMRDA cases. *E.g.*, *Quinn v. DiGiulian*, 739 F.2d 637, 651 (D.C. Cir. 1984); *Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373, 1380 (8th Cir. 1978); *see also Petramale v. Laborers Local 17*, 847 F.2d 1009, 1013 (2d Cir. 1988). Moreover, punitive damages may be awarded in cases involving violations of civil rights under 42 U.S.C. § 1983, *Smith v. Wade*, 461 U.S. 30 (1983), and the LMRDA is most closely analogous to section 1983, not to the DFR, the National Labor Relations Act, and the other statutes on which petitioners rely. Pet. 9-10. *Reed v. UTU*, 109 S. Ct. 621, 629-630 (1989). Accordingly, the availability of punitive

damages is not a substantial question warranting this Court's review.[3]

2. Petitioners do not suggest that there is any disagreement among the lower courts about whether damages are available in LMRDA cases for emotional distress, and in fact the circuits are unanimous in upholding such damages in appropriate cases. *Bise v. IBEW Local 1969*, 618 F.2d 1299, 1305 (9th Cir. 1979); *Rodonich v. Laborers Local 95*, 817 F.2d 967, 977-978 (2d Cir. 1987); *Simmons v. Textile Workers Local 713*, 350 F.2d 1012, 1020 (4th Cir. 1965). Petitioners try to suggest a split in the circuits by arguing for a requirement that a plaintiff first show a physical manifestation of the emotional strain. Pet. 14. The court below, like the Ninth Circuit cases on which it relied, agrees with the Second Circuit that emotional distress damages should not be awarded absent a showing that the union member has suffered tangible injuries. Whether loss of wages is a sufficient showing of tangible injury, or whether a doctor's testimony or the plaintiff's own testimony about sleepless nights should also be required, is scarcely a question of sufficient moment to warrant this Court's attention.

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[3] Petitioners cite one case as having "questioned" the availability of punitive damages in LMRDA cases. Pet. at 11 n.10, *citing McCraw v. Plumbers*, 341 F.2d 705, 710 (6th Cir. 1965). That case involved a union member's claim for lost wages incurred before his suspension from membership, which the court denied on the ground that only damages that are "directly and proximately caused" by an LMRDA violation may be awarded. Although it is not clear that McCraw was seeking punitive damages, the same court later indicated that *McCraw* implied that punitive damages would be unavailable, while simultaneously questioning the "present viability" of that aspect of *McCraw*. *Shimman v. Frank*, 625 F.2d 80, 101 (6th Cir. 1980).

Here, because he failed to kow-tow to the union's political leaders, Guidry was subjected to unremitting pressure through expulsion from the union at a union meeting stacked with supporters of the incumbents, hiring hall discrimination, attempts to have him fired from the jobs he did obtain, late night telephone calls, threats of physical injury delivered face-to-face on the job, and even threats against his life. Even the Second Circuit has held, in a DFR case, that a union may be liable for emotional distress damages absent physical injury where the union's conduct was outrageous, which was certainly the case here. *Baskin v. Hawley*, 807 F.2d 1120, 1133-1134 (2d Cir. 1986). Nor is there any basis for concluding that the award here was the product of a runaway jury — the case was tried to the bench, and Guidry received a modest award of $20,000 for emotional distress. Whatever the proper standard for claims for emotional distress under the LMRDA, this is the sort of case in which such damages ought to be available, and neither the availability of emotional distress damages, nor the question of the proper standard, warrants review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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